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No. _____

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1988

DENNIS EARL THORNTON, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Attorney for Petitioner

May 13, 1988

QUESTIONS PRESENTED

1. Has a convicted defendant been denied due process of law under Blackledge v. Perry, 417 U.S. 21 (1974) where there is a realistic likelihood that he was prosecuted on additional charges because he exercised his constitutional and statutory rights against self-incrimination and to nonexcessive bail?

2. Has a convicted defendant been denied due process of law under Brady v. Maryland, 373 U.S. 83 (1963) when evidence material to his guilt or innocence has been destroyed because of the prosecution's inexcusable delay in securing the evidence from state officials?

LIST OF PARTIES

All parties to this proceeding are listed in the caption.

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STATE STATUES

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1988

DENNIS EARL THORNTON, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, Dennis Earl Thornton, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on March 14, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit has not been reported. It is reprinted in the appendix hereto, infra.

The judgment on conviction of the

United States District Court for the Central District of California also has not been reported.

JURISDICTION

Petitioner was criminally convicted in the United States District Court for the Central District of California before the Honorable William P. Keller and a jury. The district court had jurisdiction under 18 U.S.C. section 3231.

The petitioner appealed his conviction to the Ninth Circuit Court of Appeals, pursuant to 28 U.S.C. section 1294(1). The court affirmed his conviction.

Jurisdiction of this Court to review the judgment of the Ninth Circuit Court of Appeals is invoked pursuant to 28 U.S.C. section 1254(1).

UNITED STATES CONSTITUTIONAL

PROVISIONS INVOLVED

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This case involves prosecutorial misconduct that resulted in petitioner's criminal conviction in denial of due process of the law.

On November 19, 1985, petitioner was arrested by Long Beach, California, police officers on various drug and gun charges. These charges included violations of California Penal Code section 12021 (possession of firearms by a convicted felon) and California Penal Code section 496 (receiving a stolen firearm). These

charges were based in part on evidence seized from petitioner's residence conducted pursuant to a search warrant.

On November 25, 1986, petitioner was arrested again, and charged with violations of California Penal Code section 12021(a). These charges were based on evidence seized by officers executing a search warrant for a residence of an acquaintance of petitioner's.

As a result of an analysis by the Federal Bureau of Alcohol, Tobacco and Firearms ("ATF") of the firearms seized during the 1985 and 1986 searches, a federal magistrate's complaint and then later a federal indictment were issued against petitioner. As a result of a detainer issued on these charges, petitioner was not released on the state bail which he had been successful in posting. Petitioner pleaded not guilty to all counts of the federal indictment.

At a hearing before a federal magistrate the federal prosecutor was

successful in obtaining an order of permanent detention. The district court reversed this order and, over the prosecution's strenuous objections, ordered that bail be set at a $150,000 appearance bond. The prosecution agreed that no bail should be set, or, alternatively, that bail be set at $500,000. The Nebbia hearing on the $150,000 bond was set for January 29, 1987.

On January 27, 1987, two days before the scheduled Nebbia hearing, the prosecutor filed a superseding federal indictment. The superseding indictment had all charges of the original indictment with certain added charges. Added as Count I of the new indictment were old gun offenses relating to the 1985 gun charges then pending against petitioner in state court. The superseding indictment also added new gun charges (possession of a .357 revolver and a 9mm handgun) based on the 1986 gun charges. A bail hearing was

held on the new indictment, at which the prosecutor asked that bail be set at $500,000. Bail was set at $500,000. Petitioner was not able to make this higher bond; as a result, petitioner was permanently detained.

Petitioner moved to dismiss the additional counts of the superseding indictment on grounds of vindictive prosecution. The district court denied his motion.

In January, 1987, petitioner's counsel requested that the federal prosecutor turn over to the defense tape recordings the Long Beach Police Department made during the 1986 search that resulted in gun charges being filed against petitioner. The prosecutor delayed inexcusably in securing these tapes until almost the eve of trial. On March 16, 1987, the day the tapes were to be turned over to the defense, the Long Beach Police Department erased the tapes in violation of California Government Code

section 34090.6, which requires that recordings of telephone and radio communications by the department that are evidence in any pending litigation "be preserved until pending litigation is resolved."

Petitioner moved to dismiss the indictment as a sanction for destruction of evidence, pursuant to Brady v. Maryland, 373 U.S. 83 (1963). The district court denied petitioner's motion.

Petitioner was convicted on all counts of the indictment after a trial by jury. Petitioner appealed his conviction to the United States Court of Appeals for the Ninth Circuit. On March 14, 1988, the Ninth Circuit affirmed petitioner's conviction. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

1. THE ADDITIONAL CHARGES OF THE SUPERSEDING FEDERAL INDICTMENT SHOULD BE DISMISSED BECAUSE OF VINDICTIVE PROSECUTION AS ESTABLISHED IN BLACKLEDGE

V. PERRY (1974) 417 U.S. 21.

This case presents the issue of whether a court should apply a presumption of vindictiveness in determining whether a prosecutor acted vindictively in prosecuting a defendant on additional charges after the defendant exercised his constitutional rights against self-incrimination and his statutory and constitutional right to non-excessive bail.

This Court has recognized the principle that:

> To punish a person because he has done what the law plainly allows him to do is a due process violation "of the most basic sort." [Citation.] For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right. United States v. Goodwin (1982) 457 U.S. 368, 372.

Charges against a defendant must be dismissed when the government brings those charges to retaliate for a defendant's exercise of his

constitutional or statutory rights. Blackledge v. Perry (1974) 417 U.S. 21; North Carolina v. Pearce (1969) 395 U.S. 711. In Pearce, this court held that due process prohibits a judge from imposing a more severe sentence upon retrial to discourage defendants from exercising their statutory right to appeal.

> Due process of law . . . requires that vindictiveness against a defendant . . . must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motive on the part of the sentencing judge.
> Id., at 725.

To assure the absence of a retaliatory motive, this court held that stiffer resentencing upon retrial is presumptively vindictive. Id. This presumption can only be overcome by on-the-record "objective information concerning identifiable conduct on the

part of the defendant occurring after the time of the original sentencing proceeding." Id., at 726.

In Blackledge v. Perry, supra, this court extended the prohibition against vindictiveness to the prosecutor. In Perry, a defendant was convicted on a misdemeanor assault charge in a state court of limited jurisdiction. The defendant exercised his statutory right to a trial de novo. The prosecutor responded by bringing a more serious felony charge against him. This court held that a presumption of vindictiveness should be applied if the situation posed "a realistic likelihood of vindictiveness." Id., at 27. The court concluded that "the opportunities for vindictiveness in this situation" required a presumption of vindictiveness.

In United States v. Goodwin (1982) 457 U.S. 368, this court addressed the issue of whether the Pearce presumption should be applied to a prosecutor's

"pretrial response to a defendant's demand for a jury trial." Id., at 369-370. Relying on Blackledge, the Court once again framed the issue as whether the situation presented a "realistic likelihood of vindictiveness." Id., at 384. The court concluded that it was very unlikely that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing additional charges, and accordingly found the Pearce presumption inapplicable. Id. The court held that the defendant therefore had to prove actual vindictiveness.

The circuit court here failed to analyze the facts of this case under the appropriate legal standard. Pearce, Blackledge and progeny make clear that a court presented with allegations of vindictive prosecution must analyze the situation to determine if the prosecutor's conduct presents a realistic likelihood of vindictiveness. Accord, United States v. Andrews (6th Cir. 1980)

633 F.2d 449, 454 (presumption of vindictiveness must be applied to allegations that prosecutor increased charges following defendant's successful bail applications if facts indicate a realistic likelihood of vindictiveness). The circuit court here failed to analyze the facts to determine if they presented a realistic likelihood of vindictiveness, and relied instead on an "independent reason" standard. See Opinion at 3. An "independent reason" standard is inconsistent with the established realistic likelihood of vindictiveness standard required under Blackledge because an "independent reason" will vindicate a prosecutor even when evidence in the record makes it likely that the prosecutor was acting vindictively.

The prosecutor brought the superseding federal indictment shortly after petitioner exercised his constitutional and statutory rights to plead not guilty and to obtain non-

excessive bail. The superseding indictment maximized the number of possible offenses for which petitioner could be prosecuted and added two years to his sentence. The superseding indictment also afforded the prosecutor the opportunity to more than triple the bail (from $150,000 to $500,000). The prosecutor had originally requested that petitioner be permanently detained. When the district court reversed the Magistrate-ordered permanent detention, the prosecutor recommended a $500,000 bond on the original indictment, which the district court found to be excessive. The court set the bond at $150,000 with a Nebbia condition. Two days before the scheduled Nebbia hearing, petitioner learned that he was being arraigned on the superseding indictment, and that the hearing on the $150,000 bond could not go forward.

The record here establishes that the prosecutor had no justification for

bringing the superindictment that was not also present at the time of the original indictment. The record shows that the government was aware of all the superseding indictment charges before filing the original indictment. The additional charges could not, therefore, be based on the discovery of new information.

In his declaration, the prosecutor claimed that he was unaware of the gun offenses in the 1985 state prosecution until the week of January 11, 1987. But at the vindictive prosecution motion he admitted, inadvertently, that he had the 1986 LBPD police report sections that expressly mention the 1985 gun offenses.

The government would hardly file serious felony charges without first reviewing the police report. And the record shows that the prosecutor did indeed review the police report. At the December 12 permanent detention hearing and the January 8 bail reduction hearing,

in an attempt to get permanent detention, the prosecutor went through all the details of the related 1985 state cocaine charges. He also went through all of petitioner's arrests, even those which did not result in criminal charges. It defies credibility that he did not also know about the 1985 gun charges, with which he would be most concerned.

At the vindictive prosecution motion the prosecutor also claimed that he had requested a $500,000 bail on the superseding indictment because the outstanding $500,000 state bond on the 1986 state charges had been exonerated after the original indictment. This rationalization is belied by the fact that when the original $150,000 bond was set, it was contemplated that the prosecution would ask the state to dismiss its prosecution in order to avoid a split prosecution. The original $150,000 bond could not, therefore, have been predicated on the other state bond's

existence. Moreover, the additional charges only marginally increased petitioner's potential sentence. The prosecution added additional charges to circumvent defendant's exercise of his right to the previous $150,000 bond which he had been granted.

The government did not need to charge petitioner with the additional counts in order to "pu[t] subsequent events into perspective," as the lower circuit court maintains. See Opinion at 3. Before filing the superseding indictment the government indicated that it intended to bring in the 1983 state prosecution as uncharged misconduct under Federal Rules of Evidence 404(b). There was therefore no need to charge petitioner with the 1985 charges in order to put events into perspective. All of that evidence would have been put before the jury even under the original indictment.

Accordingly, the only reasonable

explanation for the government's superseding indictment was its desire to keep petitioner in custody after he had successfully exercised his constitutional right to a reasonable bail. It is abundantly clear that there was a realistic likelihood of vindictiveness, which warranted application of the presumption of vindictiveness standard of Blackledge. The circuit court failed to apply this presumption. Its order affirming the district court should therefore be reversed.

2. THE CIRCUIT COURT ERRONEOUSLY ASSUMED THAT THE FEDERAL PROSECUTOR WAS NOT RESPONSIBLE FOR THE STATE OFFICIALS' DESTRUCTION OF THE 1985 TAPES.

This court has held that it is a denial of due process of the law for the prosecution to withhold evidence favorable to an accused upon a defendant's specific request, where that evidence is material to a defendant's guilt or punishment. Brady v. Maryland

(1963) 373 U.S. 83, 87; United States v. Agurs (1976) 427 U.S. 97, 104-106.

> [O]ur system of the administration of justice suffers when any accused is treated unfairly. . . . A prosecution that withholds evidence on demand of an accused, which, if made available, would tend to exculpate him or reduce the penalty, helps shape a trial that bears heavily on the defendant.
> Brady, 373 U.S. at 87.

Evidence is "material" under Brady if "there is reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley (1985) 473 U.S. 667, 682. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Id. The prosecutor's good or bad faith is immaterial. Id.

Petitioner's counsel, as of January 1987, asked the federal prosecutor to turn over to the defense tape recordings the Long Beach police department made

that recorded information about the surveillance of a residence that police alleged belonged to petitioner. The tapes would have indicated what the officers said as they waited at the residence.

These tapes would have proved that the officers surveilling the residence knew that petitioner did not own or reside at the house, and that petitioner only periodically dropped by to visit. This information would have significant bearing on the issue of probable cause to search the residence, and on the issue of the officers' lack of good faith in searching the residence. The issues of probable cause and good faith are directly relevant to the validity of the residence's search and consequently to the admissibility of the guns seized during the residence's search, which formed the basis for the gun charges of Count I of the superseding federal

indictment. There is plainly a reasonable possibility, sufficient to undermine confidence in petitioner's conviction on the 1986 gun charges, that had these tapes been produced to the defense, petitioner would not have been convicted on these gun charges.

Although the federal prosecutor was told very early in the proceedings that petitioner's counsel wanted the 1986 tapes, he did nothing to preserve the integrity of the tapes and dallied for months until the last minute before trial in mid-March before taking any concrete action to obtain them. Finally, the day before trial, the prosecutor made arrangements for the tapes to be turned over to petitioner's counsel. That very day, the tapes were destroyed by the Long Beach Police Department.

The district court ruled that the police had negligently destroyed the tapes and that, in any event, petitioner had not been prejudiced by not having

access to the tapes. The Ninth Circuit affirmed the district court, holding that the Long Beach Police Department's destruction of the tapes could not be attributed to the United States, and that it was "speculative" whether the tapes would have been important to the defense. Opinion at 5 [8.]

The Ninth Circuit's ruling on this issue is clearly erroneous. The tapes were destroyed more than two months after petitioner had initially requested them from the federal prosecution. If the federal prosecutor had exercised due diligence in securing the tapes, the tapes would have been turned over to petitioner before they were destroyed. The prosecutor's delay in securing the tapes, in violation of Brady, was therefore a but-for cause of the tapes' becoming unavailable to the defense. Under such circumstances, a federal prosecutor should be held liable for the destruction of evidence by a state

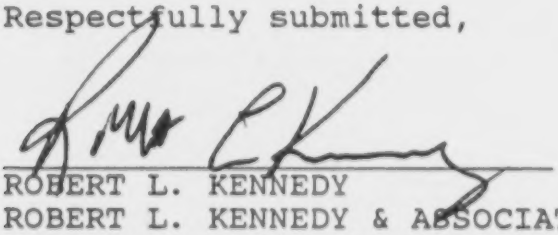
agency. The tapes were also clearly material to petitioner's guilt or innocence, as discussed above, because the tapes related to the validity of the search warrant and to the officer's good faith in seeking and executing the warrant.

Therefore, all counts of the federal indictment that relate to evidence seized during the 1986 search to which the 1986 tapes relate should have been dismissed.

CONCLUSION

The record in this case demonstrates prosecutorial abuse of such a level as to make petitioner's conviction in the face of such abuse a violation of due process of law. For all of the above-stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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Attorney for Petitioner

May 13, 1988

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 87-5131
Plaintiff-Appellee,	)	DC No. CR-86-1164(A) WDK
v.	)	
DENNIS EARL THORNTON,	)	MEMORANDUM*
Defendant-Appellant.	)	

Appeal from the United States District Court for the Central District of California William D. Keller, District, District Judge, Presiding

Argued and Submitted December 10, 1987, Pasadena, California

Before: O'SCANNLAIN and LEAVY, Circuit Judges, and ORRICK,** District Judge

Thornton appeals his conviction on four counts of being a felon in possession of unregistered firearms. He contends that the district court erred (1) by denying his motion to dismiss Count I of the superseding indictment for vindictive

prosecution; (2) by denying his motion *in limine* to exclude evidence of related but uncharged criminal conduct; (3) by denying his motion to dismiss the remaining counts of the superseding indictment as a sanction for the erasure of tape recordings; and (4) by denying his motion to suppress evidence relating to the 1985 and 1986 searches that resulted in the filing of state narcotics and weapons possession charges against him. Thornton also argues that there was insufficient evidence to support his conviction.

We affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable William H. Orrick, Jr., United States District Judge for the Northern District of California, sitting by designation.

I

On the issue of vindictive prosecution, we disagree with Thornton's argument that

the severity of the charges against him were increased because he exercised his constitutional rights. See United States v. Hooton, 662 F.2d 628, 633 (9th Cir. 1981), cert. denied, 455 U.S. 1004 (1982). Aside from the fact that the evidence does not support his contention that the government had knowledge of the 1985 charge prior to the handing down of the first indictment, an "independent reason" exists for the charge appearing in the superseding indictment: By joining that charge to the similar 1986 charge, the government not only strengthened its case but suceeded in putting the subsequent events into clearer perspective as well. See United States v. Osif, 789 F.2d 1404, 1405 (9th Cir. 1986)("[V]indictiveness is not present if there are independent reasons or intervening circumstances to justify the prosecutor's action"). Accord United States v. Martinez, 785 F.2d 663, 669 (9th Cir. 1986)(additional charges do

not raise presumption of vindictiveness unless they arise out of the same facts as charges in original indictment).

To adopt Thornton's line of argument here would be tantamount to holding that a prosecutor who fails to bring all conceivable charges against a defendant at the outset of a case forfeits the right to bring subsequent charges against him. This we decline to do. See United States v. Goodwin, 457 U.S. 368, 382 & n.14 (1982)(broad scope of prosecutorial discretion at pretrial stage); Guam v. Fergurgur, 800 F.2d 1470, 1473 (9th Cir. 1986)(same), cert. denied, 107 S. Ct. 1570 (1987).

The district court did not err by denying Thornton's motion to dismiss Count 1 of the superseding indictment. 1

II

Evidence of crimes not charged in an indictment is generally admissible, but may be excluded if its only relevance is

to show the defendant's criminal disposition. Fed. R. Evid. 404(b); United States v. Bradshaw, 690 F.2d 704, 708 (9th Cir. 1982), cert. denied, 463 U.S. 1210 (1983). Evidence otherwise admissible under Rule 404 (b) may also be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403; Bradshaw, 690 F.2d at 708.

We have previously upheld the admission of evidence of weapons possession in narcotics trafficking cases. See, e.g., United States v. Crespo de Llano, 830 F.2d 1532, 1544 (9th Cir. 1987); United States v. Kearney, 560 F.2d 1358, 1369 (9th

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1 This circuit has not settled the question of what standard of review is appropriate in vindictive prosecution matters. Compare United States v. Gann, 732 F.2d 714, 724 (9th Cir.)(contrasting abuse of discretion and clearly erroneous standards), cert. denied, 469 U.S. 1034 (1984) with United States v. Martinez, 785 F.2d at 666 (de novo review suggested). Regardless of the standard to be applied, we would affirm on this issue. See Fergurgur, 800 F.2d at 1472 (citing Gann and Martinez).

Cir.), cert. denied, 434 U.S. 971 (1977). While the instant case presents the flip side of the above (i.e., admitting evidence of narcotics trafficking in a weapons possession case), the record shows that the district court carefully weighed the admissiblility of the evidence in question, balancing the competing interests of the evidence's obvious probative value against its equally obvious prejudice to Thornton. The district court also admonished the jury that the evidence was being admitted for the limited purpose of showing motive and method of operation. Cf. United States v. Soliman, 813 F.2d 277, 279 (9th Cir. 1987)(through limiting instruction advisable, failure to give one to jury not abuse of discretion). Under these facts, the district court did not abuse its discretion by denying the motion in limine. See United States v. Lopez, 803 F.2d 969, 972 (9th Cir. 1986), cert.

denied, 107 S. Ct. 1958-59 (1987).

III

Whether a court should impose sanctions against the prosecution for destruction of evidence involves a balancing test, weighing "the quality of the Government's conduct" against "the degreee of prejudice to the accused [.]" United States v. Loud Hawk, 62d8 F.2d 1139, 1152 (9th Cir. 1979)(en banc), cert. denied, 445 U.S. 917 (1980). A qualification to the above is that the destruction of evidence by local authorities over which the prosecution did not exercise control will not ordinarily be attributed to the prosecution, particularly where the local authorities were in possession of the evidence. United States v. Higginbotham, 539 F.2d 17, 21 (9th Cir. 1976)(loss of photographs from array by city police not attributable to FBI where photographs were never in FBI's possession and local police were not acting on behalf of federal government).

Accord United States v. Traylor, 656 F.2d 1326, 1335 (9th Cir. 1981)(destruction of cocaine by local authorities not attributable to federal government, despite fact that cocaine originally seized by U.S. Customs officials); Loud Hawk, 628 F.2d at 1141-49 (destruction of evidence by state police not attributable to FBI where federal government not directly involved in defendant's arrest and search, nor in seizure and destruction of evidence).

Here, the tapes were at all relevant times in the possession of the Long Beach Police Department ("LBPD"). They were the result of LBPD work, not that of the federal government, and there is nothing to show that the LBPD was acting at the behest or under the control of the federal government in this matter. On the question of prejudice, Thornton's speculations failed to show that the erased tapes would have contained evidence

important to his defense. Accordingly, there was no abuse of discretion in the district court's finding in favor of the government on this issue. See United States v. Roberts, 779 F.2d 565, 568-69 (9th Cir.), cert. denied, 107 S. Ct. 142 (1986).

IV

With respect to the 1985 search warrant, the record reflects that the confidential informant ("CI") who assisted the police had not only provided reliable information in the past, but that the information had involved criminal activity similar to that with which Thornton was charged. See United States v. Angulo-Lopez, 791 F.2d 1394, 1397 (9th Cir. 1986)(presumption of trustworthiness of information provided by informant who gave accurate information in past is enhanced by fact that crimes involved are similar). Moreover, the information provided by the CI and the two anonymous callers was interlocking, i.e.,

it corroborated key points. See United States v. Landis, 726 F.2d 540, 543 (9th Cir.)(interlocking tips from different informants enhance credibility of each), cert. denied, 467 U.S. 1230 (1984). Finally, much of the information provided was not only detailed, but was corroborated by the independent investigation of the police as well.

Among the information provided in the affidavit supporting the 1986 search warrant was the following: (1) one CI had purchased cocaine from Thornton; (2) another CI had sold cocaine for Thornton; (3) two CIs had bought cocaine from Jerome Williams, one of whom identified Williams as an employee of Thornton; (4) two CIs identified photographs of Thornton and Williams; and (5) the CIs also identified relevant addresses and vehicles. Independent investigation by the police corroborated and supplemented much of the above information.

Under the totality of the circumstances, a substantial basis existed for the magistrate's finding of probable cause for issuing the 1985 and 1986 search warrants. See United States v. Dozier, 826 F.2d 866, 870-71 (9th Cir. 1987); United States v. Fannin, 817 F.2d 1379, 1381 (9th Cir. 1987); United States v. Fannin, 817 F.2d 1379, 1381 (9th Cir. 1987). 2

V

Thornton's final contention, that the evidence presented at trial does not support his conviction, is wholly without merit. Viewed in a light most favorable to the prosecution, more that substantial evidence was presented upon which a reasonable jury could, and did, find Thornton guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); United States v. Patterson, 820 F.2d 1524, 1525 (9th Cir. 1987).

AFFIRMED. 3

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2 Thornton also argues, in the

alternative, that the evidence seized as the result of the 1985 and 1986 searches should have been suppressed because the affidavits supporting the search warrants were lacking any indicia of probable cause, thereby denying good faith on the part of the executing officers. We disagree; the officers' good faith was objectively present. See United States v. Leon, 468 U.S. 897, 922-23 (1984).

---

3 One of the peculiarities of this case involves the question of just which of the attorneys present at oral argument actually represented Thornton in light of earlier filings. We note that Messrs. Kennedy and Harding conferred with each other prior to argument and that Mr. Kennedy deferred to Mr. Harding during oral argument, particularly on the vindictive prosecution issue. We also note that, in light of the "Declaration of Dennis Thornton" that was filed only moments before argument, Mr. Kennedy reserved 25 of the 30 minutes of oral argument for himself with five minutes for rebuttal, but yielded to Mr. Harding for most of the rebuttal time. Finally, we note that none of the issues raised by Messrs. Kennedy and Harding in their briefs have been abandoned, and that we have addressed all five issues presented therein.

[NO OPINION CITED FROM DISTRICT COURT]

JUDGMENT AND PROBATION/COMMITMENT ORDER

FINDINGS AND JUDGMENT

There being a verdict of GUILTY. on counts 1, 2, 3, and 4 Defendant has been convicted as charged in count 1; Felon in possesion of firearms, in violation of 18 USC 922(g)(1), as charged in charged in count 2; Possesion of unregistered firearms, in violation of 18 USC 922(g)(1), as charged in count 2; Possesion of unregistered firearms without serial number, in violation of 26 USC 5861(i), as charged in count 4.

COMMITMENT RECOMMENDATION

The underlying indictment is ordered dismissed in the interest of justice.

FILED: April 24, 1987
LEONARD A. BROSNAN, Clerk

By: _____
Sara Wong, Deputy Clerk

Signed by
x U. S. District Judge

_____
WILLIAM D. KELLER Date 4-24-87

No._____

_____

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1988

DENNIS EARL THORNTON, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

CERTIFICATE OF SERVICE

I, Robert L. Kennedy, a member of the Bar of this Court, hereby certify that on this 13th day of May, 1988, a copy of the Petition for Writ of Certiorari in the above-entitled case was mailed, first class postage prepaid, to Robert C. Bonner, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012, counsel for the respondent herein. I further certify that all parties required to be served have been served.

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